HAJI ABDULLAH & ORS. v. IBRAHIM & ORS.

[O.C.J. (MacIntyre J.) June 5, 1965]

[Ipoh — Civil Suit No. 294 of 1963]

Practice and Procedure — Charitable trust — Suit must be brought in the name of Attorney-General or with his consent — Government Proceedings Ordinance, 1956, s. 9.

On a question whether a suit relating to a charitable trust is maintainable against the defendants on the ground that it can only be brought by or in the name of the Attorney-General or with his consent,

Held: as the reliefs claimed in this action were brought on behalf of a charitable trust and were not among the claims specified in section 9(1) of the Government Proceedings Ordinance, 1956, the suit should have been brought and had in the name of the Attorney-General.

Case referred to:—

(1) *Cheah Ewe Chong & Anor.* v. *Cheah Kee Ee & Ors.* [1934] M.L.J. 212.

CIVIL SUIT.

P. P. Dharmananda for the plaintiffs.

W. S. W. Davidson for defendants 1, 2 and 3.

N. Sharma for defendant 4.

MacIntyre J.: In this case, Mr. Davidson on behalf of defendants Nos. 1, 2 and 3, and Mr. Sharma on behalf of defendant No. 4, have taken the point that this suit is not maintainable and is bad in law on the ground that it can only be brought by or in the name of the Attorney-General or with the consent of the Attorney-General. They rely on section 9(3) of the Government Proceedings Ordinance No. 58 of 1956 in support of their argument.

Mr. Dharmananda for the plaintiffs did not seriously contest the point and suggested that in the event of my holding that the suit should have been brought by the Attorney-General, I should give leave to the plaintiffs to substitute the Attorney-General as was done in the case of *Cheah Ewe Chong & Anor.* v. *Cheah Kee Ee & Ors.*[1]

Section 9(1) of the Government Proceedings Ordinance, 1956 lays down the rule that where certain specified reliefs mentioned therein are sought by way of a suit in relation to any alleged breach of any express or constructive trust, or in regard to the administration of any trust for public, religious, social or charitable purposes, the Attorney-General or two or more persons with the written consent of the Attorney-General may institute the necessary proceedings in court.

Sub-section (2) of section 9 merely emphasises the necessity to conform to the provisions of sub-section (1) if any of the reliefs mentioned therein are claimed.

Sub-section (3) lays down the rule that except as to the procedure to be followed in obtaining the reliefs specified in sub-sections (1) and (2), all other suits and proceedings relating to any such trust or otherwise in which the Government is interested, or in which the interest of the public are affected, or which if brought in England the Attorney-General of England would be a necessary party, shall be brought and had in the name of the Attorney-General as plaintiff or defendant.

Since the reliefs claimed in the present action are brought on behalf of a charitable trust and are not among the claims specified in sub-section (1), I hold that sub-section (3) applies and that the suit should have been brought and had in the name of the Attorney-General.

As for the oral application by Mr. Dharmananda for leave to amend the statement of claim to substitute the Attorney-General, I am satisfied this is a proper case in which I should grant that indulgence since the suit is brought on behalf of a charitable trust, and the plaintiffs have no personal axe to grind. However, I am unable to make an order at this stage without the consent of the Attorney-General.

Further hearing of the suit is therefore adjourned to the 19th July 1965 to enable the plaintiffs to apply to substitute the Attorney-General. In default, the case will stand dismissed with costs; the costs to be borne personally by the plaintiffs. If, however, in the meantime the Attorney-General is substituted then all questions of costs would be reserved for argument on the adjourned date.

Order accordingly

Solicitors: *Dharmananda & Co.; Gibb & Co.; N. Sharma.*

PHUMAN SINGH v. KHO KWANG CHOON

[F.C. (Thomson L.P., Wylie C.J. (Borneo) and Tan Ah Tah F.J.) June 8, 1965]

[Kuching — Federal Court Civil Appeal No. 82 of 1964]

Moneylending — Money loans on security of land charged — Whether charge is "document of debt" — Difficulties of interpretation — Moneylenders Ordinance (Cap. 114), ss. 3 & 4.

Land Laws — Sale of land charged as security for loans — Application for — Charge not registered in court — Land Code (Cap. 81), s. 148(2)(c).

The appellant, a registered moneylender, made an application by originating summons for an order of sale of land which had been charged by the respondent to him as security for loans of various sums of money. The respondent applied for an order that the originating summons be dismissed on the ground that the proceedings were bad for want of compliance with section 3(1) and section 4 of the Moneylenders Ordinance of Sarawak. It was only after this application but before the hearing that the charges were registered in the High Court in purported pursuance of section 3(1) of the Ordinance. The trial judge dismissed the application of the appellant on the ground that the registration of the charges under the Moneylenders Ordinance after an application

had been commenced for an order for sale was out of time, that the charges were "documents of debt" within the meaning of the said Ordinance and that by reason of want of registration they were unenforceable. On appeal the question in issue was whether there has been a failure to comply with the provisions of the said Ordinance and if so whether one of the results was to deprive the appellant of the remedy he was seeking in these proceedings.

Held: the true effect of sections 3 and 4 of the Moneylenders Ordinance is that any writing which sets out an obligation by a borrower of money to pay money to a registered moneylender under a contract of loan must be presented to an officer of the court. Where cash is to be lent it must be paid in the presence of this officer. When this is done the officer may attest the writing which must then be registered in the court. A charge of land at any rate to the extent to which it sets out the terms of a loan of money is clearly within the expression "document of debt" within the meaning of the Moneylenders Ordinance and as the charges in this case were not "made out in court" nor seen by the attesting officer in court, they were invalid as the basis of any claim for money.

Cases referred to:—

(1) *Whitney* v. *Inland Revenue Commissioners* [1926] A.C. 37, 52.

(2) *Hill* v. *Regen* [1945] K.B. 329, 332.

(3) *Abirami Ammal* v. *Meyappa Chettiar* [1959] M.L.J. 149.

(4) *Jangir Singh* v. *Ko Tak* [1957] S.C.R. 46.

(5) *Chong Cho* v. *Lau Keok Chee* [1957] S.C.R. 117.

FEDERAL COURT.

T. O. Thomas for the appellant.

S. Sahathevan for the respondent.

Cur. Adv. Vult.

Thomson L.P.: This appeal arises in connection with certain dealings between a registered moneylender and a proprietor of land. The facts, so far as they are relevant here, are not in dispute.

On 14th June, 1960, the respondent to the present appeal (the "borrower") executed a charge of his land under section 143 of the Land Code in favour of the appellant (the "moneylender"). The memorandum of charge, which was in the statutory form, recited that the moneylender had lent the borrower $6,600 with interest at the rate of 12% per annum payable monthly. This charge was registered under the provisions of the Land Code on 16th June, 1960. It is, I think, admitted and at any rate has not been denied that this sum of $6,600 was actually lent. Subsequently the borrower executed further charges of the same land in favour of the moneylender expressed to be for various sums of money lent. These subsequent charges were all in the statutory form and were all registered in accordance with the provisions of the Land Code.

Later the moneylender demanded payment of the sums in respect of which the charges had been given and, payment not being forthcoming, on 22nd May, 1964, he issued an originating summons asking for an order of sale under section 148(2) of the Land Code.

On 31st July, 1964, the borrower filed an affidavit in which he admitted the execution of the charges but denied the correctness of the amounts stated to be owing. This was based on allegations of failure to give credit for payments and compounding of interest which have not been examined and which it is not necessary for this court to examine here.

Then on 26th August the borrower filed an application for an order dismissing the originating summons on the ground "that the proceedings are bad for want of compliance with section 3(1) and section 4 of the Moneylenders Ordinance (Cap. 114)".

The matter came on for hearing the following day and was adjourned till 17th September and then till 2nd October.

On 17th September, that is during the adjournment, the charges on which the moneylender's claim was based were registered in the High Court in purported pursuance of section 3(1) of the Moneylenders Ordinance.

When the matter came on for hearing on 2nd October, 1964, the judge decided to deal first with the moneylender's application for sale. In the event he held that registration of the charges under the Moneylenders Ordinance after an application had been commenced for an order for sale was out of time, that the charges were "documents of debt" within the meaning of the Moneylenders Ordinance and that by reason of want of registration they were unenforceable.

Against that decision the moneylender has now appealed.

The real question in issue is whether there has been a failure to comply with the provisions of the Moneylenders Ordinance of Sarawak and if so whether one of the results is to deprive the appellant of the remedy which he seeks in these proceedings.

The Moneylenders Ordinance, which dates from 1912, has a somewhat sinaitic flavour. It is impossible, however, to refrain from observing that in it the demands of precision and certainty have to some extent been sacrificed in the supposed interests of simplicity.

It is entitled an Ordinance to "provide for the control of moneylenders" and provides for the compulsory registration of such persons. It does not define what a moneylender is but section 8 says that the "Ordinance shall apply to the lending of money at interest" except by a number of certain specified classes of persons including banks, pawnbrokers, statutory corporations and persons carrying on a business which does not

have for its primary object the lending of money but in the course of which and for the purpose of which money is lent.

The provisions which are particularly in point here are those of sections 3 and 4. These read as follows:—

"3. (1) Every document of debt of whatsoever nature entered into with a registered moneylender shall be made out and registered in court, and any such document not complying with this Ordinance shall not be accepted as evidence in court.

(2) No unregistered moneylender shall make out a document of debt in court.

4. At the time a document of debt, is signed by the borrower, the officer attesting such document shall, if a cash loan, see that the full amount set forth therein is paid over in his presence by the lender to the borrower or, if the consideration be other than cash, satisfy himself that the borrower has received full value for the amount set forth in the document."

The other provisions of the Ordinance, with which we are not concerned, are of a type common in this sort of legislation and provide for the re-opening of usurious transactions and so forth.

The expression "document of debt" in sections 3 and 4 is not defined. Moreover, the expression "shall not be accepted as evidence in court" is not one which is usually found in statutes of this nature.

Whatever be the true "intention of the legislature" it is difficult not to think that the draftsman of the Ordinance, though no doubt aware of the general nature of legislation elsewhere relating to moneylenders, did not in fact envisage anything more complicated than the activities of small moneylenders in a simple society. The borrower and the lender would go to the court, some functionary would satisfy himself as to the amount of the loan, if money was to pass it would be handed over there and then and then some simple sort of instrument such as a promissory note or I.O.U. would be made out on the spot and registered in the court. In particular it is extremely unlikely that the draftsman actually envisaged any such instrument as a charge of registered land because the present system of land holding based on registration and including the concept of charges as distinct from the concept of mortgages was unknown to the law of Sarawak until the Land Order of 1931 which came into force on 1st January, 1932.

The Ordinance, then, presents considerable difficulties of interpretation. These difficulties, however, must be faced. As was said by Lord Dunedin in the case of *Whitney* v. *Inland Revenue Commissioners*:— [1]

"A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

For myself I have given the matter the best consideration I can. There is little assistance to be derived from authority, although it may be that some light is shed by the following observations by Humphreys J. in the case of *Hill* v. *Regen*:— [2]

"Whether I regard the derivation of the world 'document' from Latin, or the decisions of the courts on the meaning of the word, I find that a document must be something which teaches you and from which you can learn something i.e., it must be something which affords information. In the dictionaries the word is repeatedly defined as something which is 'evidence,' not in the sense that it is something admissible in a court of law, but as being something which makes evident that which otherwise would not be evident."

In all the circumstances I have been driven to the conclusion that the true effect of sections 3 and 4 is that any writing which sets out an obligation by a borrower of money to pay money to a registered moneylender under a contract of loan must be presented to an officer of the court. Where cash is to be lent it must be paid in the the presence of this officer. When this is done the officer may attest the writing which must then be registered in the court, which in Kuching is the High Court and elsewhere the district court. A writing which has not been executed and registered in accordance with these provisions cannot be used to establish the fact of any obligation to pay money to which it relates and, to my mind, that is tantamount to saying that the document is invalid for any purpose for which a court of law would base itself on it if it were valid.

Returning to the present case, a charge of land at any rate to the extent to which it sets out the terms of a loan of money is clearly within the expression "document of debt" within the meaning of the Ordinance. That follows from the reasoning of the former Court of Appeal of the Federation of Malaya in the case of *Abirami Ammal* v. *Meyappa Chettiar* [3] where a charge of land was held not to be a sufficient memorandum of a moneylender's loan for the purposes of the Federation of Malaya Moneylenders Ordinance not because it was incapable of being such a memorandum but only because the particular charge with which the court was there concerned omitted to state a vital particular.

And if the charges in the present case are "documents of debt" (and that has never been seriously contested) they certainly did not comply with the provisions of the Moneylenders Ordinance. It was not just a case of being registered out of time. It is admitted that nothing was done even to attempt to comply with the provisions of the Ordinance till 17th September, 1964. That was long after the money was paid by the moneylender and it was long after the documents were executed. *Ex hypothesi*, then, there could be no question of the document being "made out in court" or of

the attesting officer "seeing" that the full amount of the loan was paid over in his presence. And from that it follows that as the basis of any claim for money the documents were invalid.

It has been argued that the documents were properly attested and registered under the Land Code and that that amounts to compliance with the provisions of the Moneylenders Ordinance. The argument is without substance. The two statutes are different. The object of the Land Code in this connection is to ensure the accuracy of the land register for the benefit of putative purchasers of land and the duty of persons attesting the signatures of parties to charges and other instruments affecting land is to satisfy themselves as to the genuineness of such signatures. The object of the Moneylenders Ordinance is to protect borrowers of money by ensuring that any document to which a borrower may set his hand sets out the true facts of the transaction between himself and the lender. The two statutes are different, and when a single transaction falls within the ambit of both then the provisions of both must be complied with.

I would add that I am fortified in the results at which I have thus arrived by the case of *Jangir Singh* v. *Ko Tak* [4] in which the facts were the same as those in the present case. Moreover that case effectively disposes of an argument which was addressed to us to the effect that the provisions of the Moneylenders Ordinance have fallen into desuetude so far at any rate as concerns transactions where there is a registered charge of land. That may or may not be true, and the appellant unsuccessfully sought to adduce evidence to that effect that was not called at the trial. The argument, however, is beside the point. If the Ordinance has fallen into desuetude it can only be because its provisions have been deliberately disregarded for *Jangir Singh's* case shows that the necessity for compliance has been asserted by the courts as recently as 1957.

For myself I would dismiss the appeal with costs.

Wylie C.J.: This appeal arises from the refusal of the judge in chambers at Kuching to grant to the appellant an order for sale under section 148(2)(c) of the Land Code (Cap. 81 of the Laws of Sarawak). Substantially, the reason for the refusal was that the appellant had failed to comply with the provisions of section 3 of the Moneylenders Ordinance (Cap. 114 of the Laws of Sarawak).

The appellant, in his application by originating summons, claimed to be the chargee under four charges registered under the Land Code between 16th June, 1960, and 17th August, 1963, against one piece of land of which the respondent is the registered proprietor. Appellant, in his supporting affidavit, sworn on 21st May, 1964, claimed that interest was in arrear under all four charges for varying periods all commencing from stated dates in 1963. As exhibits to his affidavit were copies of three notices all dated 25th March, 1964, whereby the respondent was given one month's notice to pay the principal and interest alleged to be owing under three of the charges, failing which application would be made for an order for sale of the land.

The respondent, in his affidavit, admitted execution of the four charges, but denied that interest was in arrear under any of the charges. He also disputed the amount owing under the charges.

On the day prior to the date the originating summons was first mentioned in chambers, a notice was filed on behalf of the respondent stating that application would be made to the court for an order dismissing the originating summons on the ground that "the proceedings are bad for want of compliance with" sections 3(1) and 4 of the Moneylenders Ordinance. The terms of this notice imply an allegation that the appellant is a registered moneylender. The fact was not recorded in evidence, but was referred to in chambers. The proceedings both in chambers and in this court have proceeded on the basis that the appellant is a registered moneylender.

The hearing of the originating summons was adjourned and, before it came on for hearing again, the charges were, on 17th September, 1964, "registered" in the registry of the Registrar-General at Kuching. This is the officer with whom, by virtue of an amendment to section 2 of the Moneylenders Ordinance effected by the Transfer of Functions (Registrar-General of Sarawak) Act 1965, moneylenders are, since 1st March, 1964 required to register their names. No consequential amendment has been made to section 3 or section 4 of the Ordinance and, in any case, it must be observed that the most recent of this series of charges was registered at the Kuching land registry on 17th August, 1963, some time before the date from which this amendment operates.

The judge in chambers held that this registration at that juncture was not sufficient compliance with section 3 of the Moneylenders Ordinance and, that being so, the "document of debt tendered in support of applicant's claim.... cannot be accepted in evidence". He took the view that he was being asked to make an order for sale on an "inadmissible document" and dismissed the application with costs.

The only grounds of appeal which I find it necessary to consider are the following:—

"1. That as a matter of law the provisions of sections 3 and 4 of the Moneylenders Ordinance do not

apply to the charges sought to be enforced by the appellant.

2. That the said charges were duly registered under the Land Code and that non-registration or late registration of these transactions under the Moneylenders Ordinance does not invalidate them."

Sections 3 and 4 of the Moneylenders Ordinance are to the following effect:—

"3. (1) Every document of debt of whatsoever nature entered into with a registered moneylender shall be made out and registered in court, and any such document not complying with this Ordinance shall not be accepted as evidence in court.

(2) No unregistered moneylender shall make out a document of debt in court.

4. At the time a document of debt is signed by the borrower, the officer attesting such document shall, if a cash loan, see that the full amount set forth therein is paid over in his presence by the lender to the borrower or, if the consideration be other than cash, satisfy himself that the borrower has received full value for the amount set forth in the document."

In support of these grounds, it was submitted that a charge on land under the Land Code was not a document of debt within the meaning of section 3 of the Moneylenders Ordinance and, alternatively, that, if it was, the Land Code, having been enacted subsequently to the Moneylenders Ordinance and containing specific provision in regard to execution of instruments under that Code, must be held to have impliedly repealed the requirements of section 3 of the Moneylenders Ordinance so far as charges over land are concerned.

The language of the Ordinance has, to say the least, some very unusual features and literal interpretation of its provisions apparently leads to some unusual consequences. The first feature which has to be considered in connection with these grounds of appeal is that there is no definition of the expression "document of debt". I have been unable to find any assistance from authorities. Section 8 provides that the Ordinance is to apply to the lending of money at interest by a person other than any of those specified in that section. In this context, and having regard to the other provisions and the general objects of the Ordinance (to which reference is made later) I can only conclude that the expression must refer to any document which records a debt arising out of the lending of money at interest.

Each memorandum of charge records, in the usual terms, the advance of a sum of money by the appellant to the respondent, the receipt of that sum by the respondent and the latter's promise to repay that sum and, in the meantime, to pay interest. The document then proceeds to create a charge over the land in favour of the appellant. There is no doubt, therefore, that this document, although it is a memorandum of charge under the Land Code, also records a debt arising out of the lending of money at interest by the appellant. On the face of things, such a memorandum of charge must come within the expression "a document of debt of whatsoever nature", using the meaning which I have perforce felt compelled to adopt in the absence of any statutory definition. This accords with the view taken by Lascelles J. in *Jangir Singh* v. *Ko Tak*.[4] Consequently, the submission that these specific memoranda of charges are not documents of debt must fail.

It was further contended that certain provisions of the Land Code were so inconsistent with those of the Moneylenders Ordinance, or alternatively that compliance with the latter in the case of charges produces inconvenience so great, that the Land Code, having been enacted subsequently to the Ordinance, must be considered to have repealed by implication the application of the provisions of the Ordinance to charges over land under the Code. Stress was laid on provisions of section 215 of the Code providing for attestation of instruments, the provisions for registration under the Code, thereby (it was submitted) rendering registration under the Ordinance unnecessary, and the grave inconvenience to all concerned if it was necessary that charges over land be "made out....in court", as required by section 3(1) of the Ordinance.

It would appear from the reference in section 6 to the preparation of a document of debt that the expression "made out" refers to the actual preparation of the document and not merely to its execution. I assume, in favour of the argument for the appellant, that the Ordinance does require the actual document to be prepared before the appropriate officer of the court.

It must be observed that there is no direct conflict between the provisions in the Code and the provisions in the Ordinance in the sense that compliance with either set of provisions renders compliance with the other set impossible. It would no doubt be highly inconvenient if all charges over land had to be "made out....in court", but this inconvenience does not apply to all charges, but only to what may be a small proportion of those charges — namely those in favour of registered moneylenders. Compliance with section 215 of the Code in those cases requires only that an attesting witness of the required category must be present when the chargor executes the charge. It was not shown that this could not be observed if the document is "made out....in court", nor that any substantial inconvenience was involved.

If the relevant officer of the court is not authorised under section 215 of the Code to attest instruments, it may be that, in order to comply with that section and section 4 of the Ordinance, two attesting witnesses are necessary. This may be somewhat inconvenient, but is certainly not a serious difficulty.

Nor was it shown that a document of debt, which is also a charge over land, cannot be registered under both the Ordinance and the Code. So far as can be seen, the same document may quite well be registered in both registers and section 3(1) complied with in the process.

As to whether this double registration is necessary, the different objects of the two enactments must be considered. The relevant part of the Land Code provides for a system of registration of land based on the Torrens system and the object is to establish and maintain an up-to-date register of land ownership and dealings with special emphasis on the fact that the register is paramount in regard to interests in land. Consequently, once a person is registered as proprietor of an interest in land (be he a registered moneylender or not) he is in a very strong position in regard to that interest.

The object of the Moneylenders Ordinance is to control the dealings of moneylenders with special emphasis on protection of the borrower in regard to transactions that may be considered harsh or unconscionable. There is no conflict between the objects of the two sets of legislation, but there is nothing in the Land Code which would tend to control the activities of moneylenders, especially in the manner envisaged in sections 3 and 4 of the Ordinance. Attestation by a responsible attesting witness under section 215 of the Land Code was pressed upon this court as a substitute for the steps provided for in sections 3 and 4 of the Ordinance. That attesting witness has, however, no responsibility to see that an instrument under the Land Code is actually prepared before him, or to see that any consideration provided for in the transaction has actually been received. Consequently, these steps for the safeguard of borrowers can be ensured only by complying with sections 3 and 4 of the Ordinance, while the object of the Land Code can be achieved only by attestation in accordance with section 215 and subsequent registration. To achieve the objects of both enactments, therefore, compliance with both enactments is necessary, and the subsequent enactment of the Land Code does not give rise to any question of implied repeal of sections 3 and 4 of the Ordinance, so far as charges over land are concerned. I therefore agree with the view expressed by Lascelles J. in 1957 in *Jangir Singh* v. *Ko Tak* [4] that registration under the Moneylenders Ordinance is still required, notwithstanding registration under the Land Code.

In the present instance, there was no compliance with sections 3 and 4 of the Ordinance. Section 3 could not be complied with by means of the late registration that was effected, because by that time it was impossible to have the document of debt prepared before an officer of the court. In consequence, these charges may not be "accepted as evidence in court", to quote the language of section 3 of the Ordinance.

To determine the effect of this prohibition, some consideration must be given to its precise meaning. The Ordinance nowhere declares a moneylending contract to be unenforceable as is provided for in some sections of the Moneylenders Ordinance, 1951, of Malaya, although section 5 does provide for relief and taking of accounts, if a transaction is considered by a court to be harsh and unconscionable. As already observed, much comment could be passed on the unusual language of the Ordinance, and, in consequence of this unusual language, little assistance in interpreting it can be obtained from any authorities. I have already referred to the objects of this legislation. These would justify an interpretation wide enough to secure these objects, but I find difficulty in giving any extended meaning to this language, because I cannot find in the Ordinance itself anything which would assist me in determining the limits to give to an extended meaning. Consequently, the only principle I feel justified in applying is the basic principle that language used in an enactment should be given its ordinary meaning in the absence of any ambiguity or difficulty in following that course. I see nothing ambiguous in this expression and no difficulty in applying it in the present proceedings, although the provision may be unusual when compared with similar legislation elsewhere. In my judgment, the only effect is that the document of debt is not to be admitted as evidence, and the section has no other direct effect on the transaction. Consequently, the contract remains enforceable, if this can be effected without having to produce the document of debt.

In these proceedings, however, what was sought was an order for sale of land under section 148 of the Land Code. That section reads as follows:—

"148. (1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court —

(a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or

(c) for the sale of the charged land,

and the court after hearing the evidence may make such order as in the circumstances seems just.

(3) The notice under subsection (1) shall comply with the terms of the charge:

Provided that, without prejudice to subsection (4) of section 145, if no period of notice for the purposes of this section is stipulated by the charge, not less than thirty days' notice shall be given."

The only evidence before the court was to the effect that the respondent had executed four charges over the land concerned securing certain principal sums and interest. The execution of the charges was admitted, but the amount owing under them was disputed and, in particular, the default alleged (that payment of interest was in arrear) was denied. With the proceedings in this state, the application to sell the land could not proceed without ascertaining whether there was any default under the charges. This necessarily involves an enquiry into the amount of principal and interest owing and payable. The starting point for that enquiry must be what is recorded in the charges as to principal and interest. Consequently, the prohibition on acceptance of the charges as evidence in court effectively prevents this application from succeeding in the state of the evidence in these proceedings.

Another matter as to which the court would need to satisfy itself on this application is that the notice given under subsection (1) (which was exhibited in the evidence on affidavit) complied with the terms of the charge, as required by subsection (3). It does not seem possible, in the course taken so far in these proceedings, for the court to be so satisfied, if the charges cannot be accepted in evidence.

I express no views as to the possibility of the charges being enforced if extrinsic evidence of the charges and their terms was available, or whether such extrinsic evidence might also have to be rejected. That question has not arisen in these proceedings and cannot be answered until it is sought to tender specific extrinsic evidence, and the question has been properly argued.

I am aware that it may be difficult to reconcile what I have said as to the effect of section 3 of the Ordinance with some of the views expressed in the judgments of *Chong Cho* v. *Lau Kheok Chee* [5] as to the general effect of the Ordinance, including the effect of section 7(2) of the Ordinance. However, that was an action for the recovery of money lent and the evidence raised questions concerning section 7 as well as section 3. The present proceedings are for an order for sale under section 148 of the Land Code and what I have said is sufficient to dispose of this appeal against the refusal to make an order for sale. I prefer to express no opinions on the further questions raised by the peculiar draftmanship employed in the Ordinance, until they are actually in issue. Perhaps before that occurs, this much criticised Ordinance will have been replaced by more intelligible legislation.

For the reasons I have given, I consider that this application for leave to sell the respondent's land cannot succeed and I would dismiss this appeal with costs.

Tan Ah Tah F.J.: I have had the advantage of reading the judgment of the Chief Justice of Borneo. I agree with it and have nothing to add.

Appeal dismissed.

NESTLES PRODUCTS LTD. & ANOR. v. ASIA ORGANIZATION LTD. & ANOR.

[O.C.J. (Williams J.) June 10, 1965]

[Kuching — Civil Suit No. K. 13 of 1964]

Trade Mark — Alleged infringement — Passing off — Fraud — Necessity to plead.

The plaintiffs sought an injunction to restrain the defendants from passing off in Sarawak a particular milk product namely sweetened condensed milk known as "Liberty Brand" as sweetened condensed milk known as "Milkmaid Brand" the passing off having been done by the adoption of labels so similar in design printing colour and get up that the public could be easily misled and confused into mistaking "Liberty Brand" milk for "Milkmaid Brand" milk. The questions for determination were whether (a) the plaintiffs had established that the get-up of the labels on the tins of their milk (Milkmaid Brand) were distinctive of their product and (b) the get-up of the labels used by the defendants on the tins of their milk (Liberty Brand) would or were calculated to deceive a substantial number of the public into thinking that the milk offered by them was that of the plaintiffs.

Held: (1) the plaintiffs had discharged the burden placed on them to show that the get-up of the labels used on the tins of their milk were distinctive of their product;

(2) as there was no evidence of intent to deceive in this case, as fraud was not pleaded and as the plaintiffs have failed to prove that the labels used by the defendants had caused any deception or confusion, the injunction should not be granted.

Cases referred to:—

(1) *Claudius Ash, Sons & Co. Ltd.* v. *Invicta Manufacturing Co. Ltd.* (1912) 29 R.P.C. 465 at p. 475.

(2) *Midland Countries Dairy Ltd.* v. *Midland Dairies Ltd.* (1948) 16 R.P.C. 429.

(3) *Kiaw Aik Hang Co. Ltd.* v. *Tan Tien Choy* [1964] M.L.J. 99.

(4) *Norman Kark Publications Ltd.* v. *Odhams Press Ltd.* [1962] 1 All E.R. 638.

(5) *Payton & Co. Ltd.* v. *Snelling Lampard & Co.* Ltd. [1901] A.C. 308 at p. 311.

CIVIL SUIT.

S. K. Reddi for the plaintiffs.

T. H. A. Potts (*D. Ong* with him) for the defendants.

Williams J.: In this action which was commenced by a writ dated the 7th February 1964 the 1st plaintiff as manufacturer and the 2nd